Supreme Court of the United States

OCTOBER TERM, 1951.

No. 717.

ALFRED H. OSBORNE, ROBERT B. SYMPSON AND PHIL CABBELL, PETITIONERS,

VS.

J. A. PURDOME, SHERIFF OF JACKSON COUNTY, MISSOURI, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

PETITIONERS' REPLY BRIEF.

STATEMENT.

Respondent never took issue with the Petitioners that the trial Judge Honorable Thomas R. Hunt, conducted an investigation and convinced himself as to the guilt of Petitioners before he caused the citations for contempt to be

issued. At page 5 of their brief they say that such statements are contrary to the record but on page 6 they say that Petitioners knew all the time that Judge Hunt had conducted such an investigation and knew all the facts and circumstances. It is true that State Senator Sawyer in his affidavit does say that he went to Judge Hunt before the contempt hearing, and told him he understood that a secret investigation had been made and statements taken and he would like to have a copy of said statements for the petitioners. But that Judge Hunt refused to give him a copy of the statements he had taken in his secret chambers. So, petitioners did not know what statements Judge Hunt had taken and did not see said statements, because Judge Hunt would not allow them to.

I.

Petitioners Were Charged with Bribery and Subornation of Perjury Outside of the Presence of the Court. Such Charges Are Not Triable by Contempt.

The complaint for contempt issued against the petitioners charges:

> "That, in the course of preparing for and during the trial of the case of *Burton* v. *Moulder* (a personal injury suit tried in Division No. 4, of the Circuit Court of Jackson County, Missouri, September 27-30, 1950, before the Honorable Thomas R. Hunt, Judge, in which petitioners Osborne and Sympson were attorneys for the plaintiff) * * * (all of the accused) did confederate and did unlawfully act to impede and obstruct the administration of justice by * * * undertaking to present to whatever jury that might be drawn for the actual trial of the case, and by actually presenting, the testimony of two alleged witnesses who in truth and fact had never actually witnessed any of the occurrences out of which the lawsuit of *Burton* v. *Moulder* arose * * *" (R. 1, 2).

"Each of the named contemnors had full knowledge of the aforesaid plan and the individual conduct of each, standing alone, constituted an action which, was designed to and which did impede and obstruct the administration of justice" (R. 2).

"That the accused '* * * did individually act to impede and obstruct the administration of justice * * *."

That "* * * the conduct (of the accused) tended to interfere and did in fact * * * impede the administration of justice * * * in this court" (R. 2).

The only witness who testified against petitioners was Vernon Everage (R. 68). At the trial he testified as follows:

"Q. Did you testify as a witness in the trial of a case, Burton against Moulder?
(fol. 230) A. Yes, I did.

* * * * * * *

Q. Was your testimony that you gave in that case true or false?
A. False.
Q. Were you paid money to give that false testimony?
A. Yes, I was.
Q. By whom were you paid?
A. Mr. Osborne.
Q. Mr. who?
A. Al Osborne.
Q. Mr. Al Osborne. Is he a practicing lawyer in Kansas City?
A. Yes, he is.
(fol. 231) Q. How much were you paid?
A. One hundred dollars.
Q. One hundred dollars?
A. Yes, sir."

on page 85 of the transcript of the Record and in testifying that he was paid one hundred dollars outside of the Court-

room to testify falsely in the damage suit of *Burton* v. *Moulder* he said:

"Q. All right. Did anything else occur in the witness room that afternoon before you testified, Mr. Everage, that you haven't told about?

A. Yes. I was given the hundred dollars that evening.

Q. By whom?

A. By Mr. Osborne.

Q. And state again where it was.

A. In the witness room.

Q. Was that hundred dollars in cash or by check?

A. It was cash.

Q. Was it in a bill of one denomination or more than one bill?

A. One denomination.

Q. What disposition did you make of that one hundred dollar bill?

(fol. 257) A. I paid a bill at the Palace with it.

Q. Palace Clothing Company?

A. Palace Clothing Company.

Q. And individual bill of your own?

A. Yes, sir.

Q. When did you make that payment?

A. Day after I testified.

Q. Do you remember what day of the week it was?

A. It was on a Saturday."

* * * * * * *

on pages 157 and 158:

"* * * Q. Where was it that Osborne paid you this $100 or gave you the $100 you testified about?

A. In the witness room.

Q. And which witness room, now?

A. I don't know which one it was.

Q. Was that after you testified?

A. No, it wasn't.

Q. Before you testified?

A. Before.

Q. Before you came up on the elevator?

(fol. 371.) * * *

* * * * * * *

Q. When you testified, how long before was it that he gave you that before you testified?

A. He gave it to me on a Thursday evening.

Q. He gave you the $100?

A. That is right.

Q. Thursday night?

A. That is right.

Q. Where?

A. In the witness room.

Q. What time that evening?

A. Oh, I don't know, sometime after five o'clock, I imagine."

* * * * * * *

It is clear therefore that these two lawyers and this Negro layman were charged with bribing Witness Everage to testify falsely.

Black's Law Dictionary, Second Edition, at page 152, defines bribery as thus:

> "BRIBERY. In criminal law. The receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity."

It was also subornation of perjury. That is defined by Mr. Black at page 1116:

> "SUBORNATION OF PERJURY. In criminal law. The offense of procuring another to take such a false oath as would constitute perjury in the principal."

Respondent tells the Court at page 20 of its brief that adverse Witness Matt Jones was thrown in the Missouri River and killed and that petitioner Osborne was not cited by this Judge for contempt for the murder of Matt Jones but was indicted by a grand jury. Why indict Osborne for murder for the alleged killing of an adverse witness and not indict him for bribery and subornation of perjury for paying a witness to testify falsely. If petitioner Osborne can be subjected to "trial by contempt" for bribery and subornation of perjury, he can certainly be subjected to "trial by contempt" for murdering an adverse witness to keep him from testifying. We think this statement of Respondent admitting that Osborne was indicted for the murder of a witness to keep him from testifying, clearly shows that he should likewise have been indicted for bribing a witness to testify in his favor if he did so. Can one be tried one way for bribing a witness to testify falsely, and another way for killing a witness to keep him from testifying. These petitioners were not guilty of contempt, if guilty of anything they were guilty of bribery and subornation of perjury. This Court should not enlarge "trial by contempt" but should curtail it and give a person his constitutional rights to a trial by jury for the commission of a felony.

Constitutional questions were raised in the first pleading of petitioners and in every pleading thereafter (R. 5-9-200-209-238-272).

II.

The Testimony of the Only Witness Everage, Is Incredible.

He testified that he was paid one hundred dollars to testify falsely in the damage suit of *Burton* v. *Moulder* (R. 68) that the one hundred dollars so given him was in cash and was a bill of one denomination (R. 85-86); that he paid a bill at the Palace Clothing Company with it (R. 86). A one hundred dollar bill would naturally attract attention when changing or showing it. He does not say he showed this one hundred dollar bill to anyone. The credit man for the Palace Clothing Company testified that Everage made a payment of $10.55 on the 30th day of September, 1950, but does not know in what denomination Everage made the payment. Whether it was a large bill or a small bill (R. 161-163-164). The Witness' wife, Helen Everage, testified that her husband told her that he had received one hundred dollars but he did not show her the one hundred dollar bill (R. 166-168). Isn't it very peculiar that this man received a one hundred dollar bill for testifying falsely and told people about it but never showed them the one hundred dollar bill and never stated where he changed it, or where he spent it? Had this man been testifying truthfully he would have stated that he showed his wife a one hundred dollar bill and that he changed it when he paid a bill or made a purchase. The fact that he was silent about showing this one hundred dollar bill to anyone and also silent about saying what he did with it is very strong evidence that he never had a one hundred dollar bill. His story is beyond belief.

III.

Petitioner Phil Cabbell Is a Negro Layman and Charged with Bribery and Subornation of Perjury.

He was entitled to a trial by jury instead of a trial by contempt.

It was charged that Osborne, Sympson, James, Cabbell, Jones and Everage "did act to impede or obstruct the administration of justice" (R. 6), only Osborne, Sympson and Cabbell appear in this case. Osborne and Sympson were Attorneys at Law, trying the damage suit of *Burton* v. *Moulder*. Cabbell was a negro layman who is alleged to have aided them in inducing Everage to testify falsely (R. 7).

It is stated in the original brief that Cabbell was only present near the Everage home when Everage talked to Osborne and Sympson but Cabbell did nothing and said nothing. He was simply present (R. 72-73-74-75).

Osborne and Sympson were Attorneys at Law and officers of the Court. It may be claimed that the Court had some kind of disciplinary control over them. But the Court certainly had no disciplinary control over layman Cabbell. They were all charged with bribery and subornation of perjury and should have been tried by jury for the commission of a criminal offense. The damage suit was tried in 1950 (R. 1-2) and was an orderly trial and no disturbance of any kind. It had long been finished when in April, 1951, this citation for criminal contempt was filed against the petitioners (R. 1-2). It may be that the testimony of Witness Everage if it was false, produced a wrong result at the trial of *Burton* v. *Moulder* but there was certainly no obstruction to the administration of justice, or any delay to the trial. Perjury may produce a wrong result but it is not contempt. It is perjury and must be prosecuted before

a jury as perjury, so is subornation of perjury a crime to be punished by trial by jury. So is murder a crime to be punished by trial by jury not "trial by contempt."

CONCLUSION.

The testimony of only one witness, Vernon Everage, convicted these two lawyers and this layman. He had been a witness in a damage suit and months after the trial had gone to the Judge's chambers and gave the Judge a written statement *ex parte*, that he had lied on the witness stand. The Judge took his statement outside of the presence of petitioners and without their knowledge before the trial for contempt. He refused to allow them to even see the statement which he had taken from Witness Everage (Affidavit of Senator Sawyer in Appendix of original brief).

The trial judge who had conducted this secret investigation was told that he had to try the contempt case and could not transfer it to another Judge (R. 44-47).

Apparently acting upon the advice that he could not call in another one of the Nine Circuit Judges in the County or call in a Judge from another part of the State as the law provides, the Judge who made the investigation proceeded to try the contempt case himself. He refused to disqualify himself although asked to. Had he thought he had a right to call in another Judge he probably would have done so, but having been advised by his counsel that he could not call in another Judge although he knew all about the case and although he had investigated it, he proceeded to try it which was a denial of due process under the 14th Amendment to the Constitution of the United States. Petitioners did not have a fair trial before a fair Judge.

We respectfully ask that the petition for Certiorari be granted in order that the rights of these two lawyers and this layman be protected.

Respectfully submitted,

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AMOS T. HALL,
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Tulsa, Oklahoma,
Counsel for Petitioners.

MAY 31 1952

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PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

At this time come the petitioners Alfred H. Osborne, Robert B. Sympson, and Phil Cabbell and ask the court to set aside its order denying petitioners' application for a writ of certiorari addressed to the Supreme Court of Missouri for the following reasons:

First, because petitioners' civil rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States have been denied:

a. They were sentenced to jail by a judge who had conducted a secret grand jury investigation and determined their guilt before trial.

b. Under the Fourteenth Amendment to the Constitution of the United States they were entitled to a fair trial before a fair judge and this they did not get.

c. They were charged with bribery and subornation of perjury committed outside of the courtroom, and were entitled to a trial by jury instead of a trial by contempt.

d. The only witness who testified against them was unworthy of belief and his testimony was not sufficient to convict anyone.

e. The gravest kind of an injustice has been done to petitioners and a re-examination and a reconsideration should be made of this short record in order to protect the civil rights of these petitioners.

f. The trial judge would have undoubtedly called in another judge when requested, had he not been told by his lawyers that he could not do so—that he had to try them whether prejudiced or not.

Wherefore petitioners respectfully urge this court to re-examine and reconsider their application for certiorari as there is no other case in the books sustaining a sentence of imprisonment in such a case.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR REHEARING.

POINTS AND AUTHORITIES.

I.

Petitioners were sentenced to prison in violation of their constitutional civil rights. This court has never yet approved a sentence of imprisonment by a prejudiced judge. There is no case in all the law books like this one. It stands alone.

II.

Since when in this country has bribery, perjury, and murder been triable by contempt without a jury? This decision sending these men to prison announces an astounding doctrine which will shock all jurisprudence.

III.

Judge Hunt was advised by his counsel that he could not call in another judge to hear the contempt charges. This erroneous advice undoubtedly kept him from calling in another judge.

ARGUMENT.

I.

Petitioners were sentenced to prison in violation of their constitutional civil rights. This court has never yet approved a sentence of imprisonment by a prejudiced judge. There is no case in all the law books like this one. It stands alone.

This court should re-examine this record and if it will do so it will find that petitioners were sent to jail by a judge who had already determined *their guilt before trial.* There just cannot be any question about this as we will show.

On page 16 of petitioners' original brief is set out an affidavit which is not questioned by Senator William Orr Sawyers of St. Joseph, Missouri, who says:

> "That, in May, 1951, and before the trial of said contempt proceeding before said Hunt in June, 1951, affiant and Senator John Hosher, of Savannah, in Andrew County, Missouri, went to the chambers of said Thos. R. Hunt at which time affiant told said Hunt that affiant had learned of said interviews and the transcription made thereof, and requested said Hunt to furnish affiant with a copy of such transcriptions at affiant's expense. That, thereupon, said Hunt became quite red-faced, and apparently embarrassed, and stated that said interviews were *his private investigation*, that they were not part of any public proceeding, that said Osborne was not entitled to such transcriptions, and said Hunt very curtly refused *affiant's request* for copies of such interviews."

And on page 4 of the same brief petitioners quote from respondent's suggestions in opposition to the extension of

time filed as a record in this court on the eighth day of April, 1952:

> "The record shows that contemnor Everage did call on Judge Hunt in chambers accompanied by his own lawyer, to give the court information about the case of *Burton* v. *Moulder*."

And on page 6 of the brief of respondent filed in this court respondent admits that the affidavit of Senator Sawyers is true by saying:

> "The affidavit of Senator Sawyers, attached to petitioners' brief, shows that petitioners were fully informed of the fact and circumstances of Everage's call long before trial."

So it cannot be questioned that:

a. The trial Judge Thomas R. Hunt conducted a secret investigation in his chambers and determined the guilt of petitioners before the contempt trial.

b. Petitioners knew nothing about said secret investigation but heard that one had been conducted and tried to get the judge to give them a transcript of the statements taken. This he refused.

c. Petitioners then filed a motion alleging prejudice and asked that an impartial judge be called in to try them but the judge was advised by counsel that he could not call in another judge, but had to hear the case himself although he had formed an opinion as to the guilt of petitioners.

d. This judge should have disqualified himself although no allegation of prejudice had been made. He knew that he could not give these men such a fair trial that they were entitled to under the due process clause of the Fourteenth Amendment.

II.

Since when in this country has bribery, perjury, and murder been triable by contempt without a jury? This decision sending these men to prison announces an astounding doctrine which will shock all jurisprudence.

The doctrine announced in this decision that a man charged with bribery, perjury, or murder may be tried by contempt without a jury is one of the most astounding doctrines ever announced in the history of this court. We respectfully state that we do not believe this court wants any such doctrines announced. It has always been the law that one charged with bribery, perjury, or murder should be given trial by jury as guaranteed by the Fourteenth Amendment to the Constitution of the United States. There just isn't any authority justifying a trial by contempt for such charges. Suppose a witness is killed to prevent him from testifying in a contempt case? Can one be charged and tried by contempt and sentenced to the electric chair upon that? The mere asking of this question demonstrates its absurdity. We feel sure that if this court will re-examine this question it will not sanction trial by contempt for murder, bribery, or perjury.

III.

Judge Hunt was advised by his counsel that he could not call in another judge to hear the contempt charges. This erroneous advice undoubtedly kept him from calling in another judge.

Judge Hunt who sentenced these men to prison knew, of course, that he had conducted a secret investigation of his own and had determined their guilt. Undoubtedly he would have called in another judge to hear the charges had he not been advised by the three lawyers he had appointed

to investigate the matter, that he could not do so. They told him that even though he was prejudiced, he had to try the contempt case. That he had no discretion about the matter and could not call in another judge even though he felt that he should (R. 44-45-46).

The trial judge, Hon. Thomas R. Hunt was wrongfully advised by his counsel and for that reason denied petitioners a change of venue as requested, and refused to call in another judge as requested. Again we say, has it come to a point in this country that a judge who has conducted an investigation of his own and determined the guilt of a person, cannot disqualify himself. This also is an astounding doctrine and should not receive the sanction of this court. Any judge with knowledge of the facts and guilt of a person would naturally not want to try such person, but here the judge was told that he had to try petitioners. That he could not call in another judge although requested to do so. This court should re-examine this question and not sanction the practice of a prejudiced judge trying a person in contempt when many other judges are available.

CONCLUSION.

Petitioners believe that they should not have been tried, as they were, by a judge who was prejudiced against them, and who had conducted a secret star chamber investigation of them. This is undoubtedly what happened. There just cannot be any question about it. The record is as clear as the noon day sun. And the reason is also clear. This judge was advised by his counsel that he had to try these petitioners even though he had conducted a secret investigation in his chambers as to their guilt. He was told that he could not call in another judge as requested. So, this record shows that these men were convicted and

sentenced to jail by a judge who had secretly determined their guilt before trial. Will this court allow such a conviction to stand? We do not believe so.

Respectfully submitted,

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Counsel for Petitioners.

CERTIFICATE.

I hereby certify that the above and foregoing petition for rehearing and brief in support of same is made in good faith and not for delay, and because I believe that petitioners have not had a fair trial guaranteed them by the Fourteenth Amendment to the Constitution of the United States.

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